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IN THE

Supreme Court of the United States

.....Term, 1976

No. 75-1761

FRANK C. HILTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinion of the court of appeals is a judgment order not reported as yet (Appendix A). The denial of rehearing *en banc* (Appendix B) is not reported as yet. There was no opinion in the district court as a direct appeal was taken to the court of appeals from the judgment of sentence.

Jurisdiction

The judgment of the court of appeals was entered on March 31, 1976. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 6, 1976 (Appendix B). This petition for certiorari was filed within thirty days of the date of the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Where the testimony of a witness is objected to for the reason that he has been granted immunity after his bank records, as well as the records of petitioner, were illegally seized under a purported subpoena *duces tecum*, which actually was a search warrant and pursuant to which the Federal Bureau of Investigation seized the records, is not the conviction illegally obtained?

2. Where it had been stipulated that an individual, if called by either the government or by the defendant, would have claimed the Fifth Amendment, should not the court below have charged the jury that they could consider the availability of the witness to the government by reason of the immunity statute and the unavailability of the witness to the defendant who had no means of compelling the witness' testimony?

3. Where a witness testifies under a grant of immunity, which testimony has been coerced by reason of the illegal search and seizure of the witness' bank records as well as the petitioner's bank records, should not the trial court have applied the exclusionary rule to such oral testimony so as not to taint the judiciary with partnership in the official lawlessness of the executive branch?

4. Where immunity is granted to a witness, whose oral testimony has been coerced by illegal search and seizure of the defendant's and witness' bank records, should not defendant's objections to the witness' testimony have been sustained?

5. Did not the possession of the defendant's income tax returns by the United States Attorney and their use on cross-examination of the petitioner violate the secrecy statutes relating to an individual's income tax returns so that their use by the government should not have been permitted on cross examination?

Constitutional Provisions and Rules Involved

The Fourth Amendment to the Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, *papers and effects*, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (Emphasis added).

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .".

Rule 17 (a), Federal Rules of Criminal Procedure, provides in pertinent part:

> "A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena; signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served . . .".

Rule 17 (c), Federal Rules of Criminal Procedure, provides:

> "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in

evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

18 U.S.C. § 1951 (Hobbs Act) provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both."

26 U.S.C. § 7213 (a) (1) provides:

"It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in an income tax return . . . except as provided by law."

Department of Treasury Regulations, 26 Fed. Reg. § 301.6103 (a)-1 (h), provide as follows:

"(h) *Use of returns in grand jury proceedings and in litigation.* Returns made in respect of any tax described in paragraph (a) (2) of this section, or copies thereof, may be furnished by the Secretary or the Commissioner or the delegate of either to a U.S. attorney or an attorney of the Department of Justice for official use in proceedings before a U.S. grand jury, or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation . . . In all other cases, written application for a return or copies thereof shall be made to the Commissioner of Internal Revenue, Washington, D. C. 20224, with a copy

addressed to the internal revenue officer (the district director or the director of the service center) with whom the return was filed. The application shall be in writing and shall show (1) the name and address of the person for whom the return was made, (2) the kind of tax reported on the return, (3) the taxable period covered by the return, and (4) the reason why the return or a copy thereof is desired. Such application shall be signed by the U.S. attorney if the return or copy is for his use, or by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General if the return or copy is for the use of an attorney of the Department of Justice. For provisions relating to the certification of copies of returns, see § 301.6103 (a)-2. If a return, or copy thereof, is furnished pursuant to this paragraph, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States is not interested in the results, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto. See paragraphs (e) and (f) of this section for use, in proceedings to which the United States is a party, of information obtained by executive departments and other Federal Government establishments from inspection of returns. If a U.S. attorney or an attorney of the Department of Justice has obtained a copy of a return under paragraph (g) of this section, an application for the use of such return in a situation specified in this paragraph shall not be necessary . . . ".

Statement

Petitioner, Frank C. Hilton, was Secretary of Property and Supplies of the Commonwealth of Pennsylvania. The

federal government was investigating the conduct of his office for alleged Hobbs Act violations. A subordinate, one Anthony Trucco, testified that he received some $146,000.00 from the broker of a large insurance policy placed by the Commonwealth of Pennsylvania and that he retained $72,000.00 and paid $74,000.00 to the petitioner Hilton.

In an effort to corroborate Trucco's testimony, the government called one David Oppenheim. Oppenheim's testimony concerned a matter which was prosecuted in the United States District Court for the Western District of Pennsylvania to No. 75-104 Criminal and which was appealed to the court of appeals to No. 74-1441. The appeal was denied and a petition for certiorari on the conviction in the Western District of Pennsylvania is being filed simultaneously with this petition.

The record of the District Court for the Western District of Pennsylvania was incorporated in the Middle District action, and the attention of the trial court called to the fact that the District Court for the Western District of Pennsylvania found that the procedure used in obtaining the records of Oppenheim was improper and in denying the motions to suppress and dismiss the trial court held:

> ". . . although in doing so we do not rid ourselves of a chill at the base of the spine. We are old enough to remember how other democratic constitutional systems were brought to destruction by the use of their own legal processes" (177a).

It was established that the officers of the bank from which the immunized witness' records were taken, as well as the petitioner's records, would not have surrendered the documents except for the fact that when the subpoena had been served on them by the FBI, the agents stated they would not leave without the subpoenaed records.

The Court of Appeals for the Third Circuit in denying the appeal to No. 75-1441 did so while expressing

> ". . . grave disquietude with respect to the above discussed aspects of the issuance and 'forthwith' production provisions of the subpoena."

The court of appeals also found that the influence of the United States Attorney's office on federal court grand juries "is not a license to misrepresent". The court also found that despite the motivation of the prosecutor

> "The hard fact is that a misrepresentation was made; the subpoena commanded a forthwith presentation to the grand jury of materials at a time when the United States Attorney's office may or should have known the grand jury would not be in session to receive the documents forthwith."

The entire record in the District Court for the Western District of Pennsylvania has been made part of the petition for certiorari in that case and is incorporated herein by reference thereto.

In addition to the argument made in that petition for certiorari, the trial court in the instant proceeding erred in refusing to charge the jury that where an individual, if called by either the government or by the defendant, would have claimed the Fifth Amendment, the jury could consider the availability of the witness to the government by reason of the immunity statute and the unavailability of the witness to the petitioner, who has no means of compelling the witness' testimony. In this case, the banker, Herman J. Israel, had pleaded the Fifth Amendment in the District Court for the Western District of Pennsylvania when called as a witness. It was stipulated he would have claimed the Fifth Amendment in Scranton, the Middle District case. Oppenheim had been given immunity and testified for the government. Immunity for Israel was

withheld. Thus, the defendant Hilton could not elicit testimony from Israel concerning facts about which only Israel could be held to have witnessed, in violation of the Sixth Amendment to the Constitution of the United States.

The final area of concern in this case is that after Hilton took the stand in his own behalf, the United States Attorney proceeded to cross-examine him extensively on income tax returns for the years 1968 through 1973 (453a through 460a). Before the cross-examination, a side bar conference was requested and objection was made to the prosecutor's even having the petitioner's tax returns since there was no investigation or indictment for income tax violations nor were the income tax returns a proper subject of cross-examination especially since several of them related to at least three years before the petitioner became Secretary of Property and Supplies.

Reasons for Granting the Writ

The unlawful seizure of petitioner's bank records together with the bank records of a witness who was granted immunity to testify against the petitioner taints the judiciary with the partnership in the illegal activities of the executive branch of government. There is no basis in law for a subpoena issued by the United States Attorney's office to turn records over to the FBI any more than there is authority in the law for the United States Attorney's office to subpoena witnesses to appear in his offices and not the grand jury. See *Durbin v. United States,* 221 F.2d 520, 522 (C.A.D.C. 1954). Unless bank records can be secured only by legal process, the courts will have unleashed federal and state inquisitors with unbridled discretion to seize the bank records of any citizen without probable cause. Such grant of power will effectively repeal the Fourth Amendment under a technical and

inapplicable finding that no one has "standing" to assert Fourth Amendment rights. The "imperative of judicial integrity" will become a discarded doctrine. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968); *Elkins v. United States,* 364 U.S. 206, 222, 80 S.Ct. 1437, 1447, 4 L.Ed. 2d 1669 (1960). As stated in *Terry v. Ohio, supra:*

> "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

At the trial it was stipulated by the government that Herman J. Israel would take the Fifth Amendment if called as a witness by either the government or the defendant. The government has the power to grant immunity to a witness. The defendant does not. A jury does not know the difference unless the court in its charge explains the difference. It is a legitimante factor to be weighed by a jury that a witness is available to the government and unavailable to a defendant. The expanded use of immunity to buy testimony to secure convictions is spreading like wildfire throughout this land. At least a defendant should have a court instruction that where a witness could be made available by the use of immunity and is not, the finder of fact can weigh the reasons for the government's failure to provide immunity to make the witness available.

Every citizen is compelled to file income tax returns and failure to do so carries severe penalties. It is becoming more and more evident that income tax returns are used by other branches of government for purposes never intended by Congress. The disclosure procedure is a cursory one granted with very little thought and only the conclusion that the records when furnished may only be

used for "proper purposes". In this case, when it was apparent that the prosecutor had the tax returns of the petitioner and was about to use them on cross-examination, a timely objection was made to the fact that the income tax returns were even in the possession of the prosecutor. This objection was overruled.

The government cited *Laughlin v. United States,* 474 F.2d 444 (C.A.D.C., 1972), footnote 12, in support of its right to the possession of the returns. In the footnote to the *Laughlin* case, the court of appeals simply alludes to the fact that tax returns supplied to the United States Attorney may be used in grand jury proceedings, and, without reference to any statutory authority, then refers to the returns being disclosed to "juries and government witnesses in such proceedings". The phrase "in such proceedings", however, in the context of the facts of the *Laughlin* case refers to grand jury proceedings. The regulations of the Treasury Department cannot abrogate a statute. The indictment returned against Hilton involved alleged kickbacks in the years 1973 and 1974. The tax returns requested by the government went back to 1970, when Hilton was not Secretary of Property and Supplies and three years before the events alleged in the indictment. By reason of amended returns filed by the taxpayer, the government was given his returns to 1968, long before he became Secretary of Property and Supplies and five (5) years before the events alleged in the indictment.

Under the Treasury Department's regulations, the use of a copy of a tax return is limited "to the purpose for which it is furnished". The letter addressed by United States Attorney Cottone to Charles A. Gibbs, Chief, Disclosure Staff, Office of Assistant Commissioner, did not set forth matters with any specificity which would even permit the head of the so-called Disclosure Staff to believe that tax

returns were being furnished for an authorized purpose under the regulations. If Hilton had been indicted for income tax evasion, the tax returns would be relevant and no objection could be made to their use. This indictment involved the sole allegation that Hilton received money from Trucco, which allegation was denied by Hilton. Even if the tax returns for 1973 and 1974 could have been examined to determine whether such income was reflected in Hilton's returns, it would not make the returns from 1968 through 1973 available to the government for use in cross-examination of the defendant under the facts of this case.

Treasury regulations should not be broadly construed so as to permit every investigatory body in the United States to have easy access to the personal and confidential matters disclosed by each individual's income tax returns. Tax returns are compelled to be filed by statute, with substantial criminal penalties resulting from failure to comply with the applicable statutes. Such disclosures are still subject to Fourth and Fifth Amendment protections. The procedures followed by the Treasury Department do not give an individual any protection from the prying eyes of the curious, whether they be in governmental agencies or elsewhere. Having secured the tax returns without any probable cause for their use, permitting the government to then cross examine a defendant is again to legitimatize the illegal and unlawful conduct of government officials.

The court below and the government relied on the language in the Treasury regulations that the returns may be used

> ". . . in proceedings before a U.S. grand jury, or in litigation in any court, if the United States is interested in the result, . . ."

The fact that the United States is a nominal party to the criminal prosecution does not mean that the United States is interested in the result as related to the use of the tax returns. Under the ruling of the court below, any defendant in any criminal case would be subject to having all of his income tax returns turned over to the prosecutor to be used as a surprise in challenging testimony offered by the defense although the defendant's income as disclosed by the returns has no relevancy to the facts charged in the indictment. Such broad use of private papers of citizens never was contemplated by Congress and certainly cannot be read into bureaucratic regulations. The objection to the use of the information disclosed by the tax returns on cross examination should have been sustained.

If this conviction is affirmed, it will be a blanket authorization to the government to continue to secure tax returns when they are not properly the subject of the investigation of the grand jury or the United States Attorney's office or anyone else, but in the hopes that if there is a criminal action, the returns might then be used. It is apposite to note that the returns were not offered in the case in chief by the government and in fact had no relevancy to the government's case in chief. That they were only used in cross-examination of the defendant after he took the stand establishes that the prosecutor's office had no right to the returns in the first place.

Conclusion

For the reasons set forth in the petition for certiorari simultaneously filed herewith, the testimony of the witness Oppenheim should not have been permitted since his immunized testimony, as well as the illegally seized documents which related thereto, as well as the documents relating to the petitioner, were introduced into evidence and given the judicial sanction of the courts, violating the percept of judicial integrity. Also, where the government refuses to give immunity to a witness whose identity is known to the government and who has not been prosecuted for any federal crime, the jury should be instructed that such a witness is available to the government but not to the defendant so that the jury might consider the refusal of the government to immunize such a witness in the context of the entire case. The use of income tax returns in cross-examining a defendant violated the secrecy of the tax returns as proscribed by statute and which Treasury regulations cannot broaden. To hold otherwise would permit the government to have tax returns of all defendants in all criminal cases in which the United States of America is the nominally captioned plaintiff.

For the reasons above set forth, this petition should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 75-1441

UNITED STATES OF AMERICA,

v.

FRANK C. HILTON,

Appellant.

(Crim. No. 75-90, M.D. of Pa.)

Submitted Under Third Circuit Rule 12(6)

December 10, 1975

BEFORE SEITZ, *Chief Judge,*
GIBBONS AND ROSENN, *Circuit Judges.*

Judgment Order

After considering the contentions raised by the appellant, to-wit, that the district court erred (1) in permitting a witness to testify as to illegal acts committed by defendant which were not charged in the indictment, where the witness' testimony under a grant of immunity was coerced by an illegal search and seizure of his bank records; (2) in refusing to charge the jury that it could consider the

availability of another witness to the government by reason of the immunity procedure, where it was stipulated that the witness would have invoked the Fifth Amendment if called by either the government or the defendant; (3) in refusing to rule that the possession and use of defendant's income tax returns by the United States Attorney violate the Secrecy Statutes relating to an individual's income tax returns; and (4) in refusing to charge the jury that it must find the defendant had knowledge that the alleged extortion would actually affect interstate commerce; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

SEITZ,
Chief Judge.

Attest:
THOMAS F. QUINN,
Clerk.

Dated: March 31, 1976.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 75-1724

UNITED STATES OF AMERICA

v.

FRANK C. HILTON,

Appellant.

(Crim. No. 75-90, M. D. of Pa.)

***Sur* Petition for Rehearing**

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

SEITZ,
Chief Judge.

Dated: May 6, 1976.

see

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1760